

***United States Court of Appeals
for the
District of Columbia Circuit***



**TRANSCRIPT OF
RECORD**

22

UNITED STATES COURT OF APPEALS
For the District of Columbia Circuit

United States of America

v.

George L. Samuels,

Appellant

No. 24,077

* * * * *

BRIEF OF APPELLANT

United States Court of Appeals
for the District of Columbia Circuit

FILED JUN 8 1970

Nathan J. Paulson
CLERK

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STATEMENT OF ISSUES PRESENTED

1. Whether an arrest is with probable case when based on a broadcast lookout for a Negro male wearing a black rain-coat and the suspect answering that description is seen from a distance carrying a dark article of clothing.

2. Whether the Court of General Sessions has authority to order a line-up after conclusion of a Preliminary Hearing.

STATEMENT UNDER RULE 8(d)

This case has not been before this court previously.

REFERENCES AND RULINGS

1. With respect to Probable Cause
Tr. 10-11, 27, 29, 220
2. With respect to identification testimony
Tr. 84, 220

STATEMENT OF THE CASE

The defendant was tried on a charge of robbery, and was found guilty during a trial before The Honorable June L. Green, United States District Judge for the District of Columbia, on December 8 and 8, 1969. He was sentenced on February 17, 1970 to serve three to ten years. The offense of which the defendant stands convicted took place on February 3, 1969 and consisted of a robbery of the Mid-City Delicatessen, 1125 Fourteenth Street, N. W., Washington, D. C. The offense was said to have taken place at about 8:15PM. The person said to have committed the offense, after taking a sum of money from the cash register in the establishment, ran out the front door, up Fourteenth Street, and was seen by the owner of the store to be running East along M Street. The police were notified and a look-out was broadcast on the police radio.^{1/} Officers Bowden and Thurman, in a scout car, observed the defendant shortly thereafter walking East on M Street near the intersection of 9th and M Streets, N. W. They pulled into a driveway ahead of him and called to him.^{2/} Upon being called, the defendant ran and was pursued by the police. He was apprehended by these policemen, approximately three blocks away.^{3/} The defendant was searched on the scene and \$34.00 in one and five dollar bills was taken from his pocket.^{4/} The police recovered a black rain-

^{1/} Tr. 129

^{2/} Tr. 129-130, 117

^{3/} Tr. 130

^{4/} Tr. 119

coat, which the defendant was said to have been carrying, from a point along the path he had run while pursued by the police.^{5/} The defendant was taken to the police precinct house for interrogation. During that time, the complaining witness came into the precinct, saw the defendant and identified him to the police.^{6/} Also during that time, the police recovered a small amount of the white creamy substance from the defendant's ear.^{7/}

At the scene of the offense, the employee on duty had thrown a bowl containing mayonnaise at the offender. A portion of the mayonnaise was recovered from the door of the establishment by the police. Samples of both materials were submitted to the FBI for examination, and an FBI chemist testified at the trial that both contained vegetable oil. It is known that vegetable oil is a constituent of mayonnaise. The police also submitted to the FBI the raincoat which the defendant was said to have thrown away during flight. The FBI chemist recovered a small amount of material from a grease stain on the coat and testified that it, too, contained vegetable oil.

After interrogation by the police, the defendant was taken to the Court of General Sessions. On February 4, 1969, the Preliminary Hearing was continued to February 6,

^{5/} Tr. 130

^{6/} Tr. 106-107

^{7/} Tr. 155

1969. On February 6, 1969, Judge Howard of the Court of General Sessions conducted a Preliminary Hearing and ordered the defendant committed. Subsequently, Judge Pryor of the Court of General Sessions entered an order instructing that the Department of Corrections deliver the defendant to the Robbery Squad Headquarters of the Police Department on February 11, 1969 for purposes of a line-up. A line-up was held on the evening of February 11, 1969 during which time the defendant was viewed by the complaining witness.

Timely motions were filed requesting suppression of tangible evidence taken from the defendant and eye witness testimony by the complaining witness. These motions were overruled and testimony was admitted at trial with regard to both. This testimony included the money taken from the defendant, the black raincoat and the creamy substance taken from his ear. In addition, testimony was introduced with regard to the identity of the defendant and also with regard to his being seen at the police station ^{8/} and during the line-up. ^{9/}

^{8/} Tr. 96, 107

^{9/} Tr. 97-98

ARGUMENT

PROBABLE CAUSE:

A significant issue in this case is the question of probable cause to support the arrest of the defendant at about 8:15PM on February 3, 1969.

The facts to be considered are the information possessed by the police officers at the time of the arrest. Since one element in consideration of this issue is the time when the arrest took place, it is necessary to consider this question at three stages.

The police first observed the defendant in the 900 block of M Street, N. W., pulled ahead of him in their police car and called to him. The defendant ran from the police and was chased by one of them, Officer Thurman. Officer Thurman caught the defendant once during the pursuit. The defendant then got up and started to run again. In the meantime, the other officer in the patrol car had driven to Seventh Street, and the defendant was apprehended when he ran to Seventh and M Streets, N. W. The arrest could have taken place when the police first attempted to stop the defendant, when he was stopped midway during the pursuit, or when he was finally apprehended at Seventh and M Streets, N.W. It is necessary to consider the information in the possession of the police at each of these three times.

At the time when the police first observed the defendant, the only information they had available

was in the form of a radio broadcast over the police radio. A transcript of this broadcast was made available by The United States Attorney at the trial, and was presented as defendant's Exhibit No. 1 for the Pre-Trial Motion. The initial description broadcast read as follows:

"Scout 26 and 27, a robbery-holdup at the carry-out, 1125 14th St., N.W... The tentative lookout is for a Negro male, wearing a black raincoat, last seen running on M-Mary toward 13th St... He dropped the hat he was wearing on the scene. 8:23...SCT. 26 You get the lookout."

Shortly after this broadcast, the following was broadcast:

"SCT. 27 : Can we have that lookout again, please?"

DISP. : One Negro male wearing a black raincoat running on M-Mary toward 13th St."

The continuation of the transcript indicates that it was very shortly after this broadcast that scout-car 28 reported that it had a suspect in view. Officer Thurman testified that he was riding in scout-car 28. TR. 16. Therefore, the above two broadcast descriptions comprise all of the information available to the police at this time.

It is the defendant's contention that this information would not be sufficient to justify arrest. The information available to the police in this case was even less than available to the police in the case of Gatlin v. United States 326 F.2d 1966 (D.C. Cir., 1963). In that case, this Court described the evidence as follows:

"The only evidence on which the arrest was predicated was the fact that there was a robbery, that one of the robbers was a Negro wearing a trenchcoat, that a Negro man fled from a taxi, and that Gatlin, a Negro man, was observed walking down the street a mile and a half from the robbery wearing a trenchcoat."

The police testimony in this case was that the defendant George Samuels was seen walking East in the 900 block of N Street, N. W., and that he was carrying an object in his left hand which appeared to be a black raincoat. TR. 6. Officer Thurman stated that the "raincoat" was folded in the defendant's hand at the time when he was observed TR. 19. The police were traveling East on M Street at the time, and therefore were across the street from the defendant, and on his right side. The raincoat was not recovered until after the defendant was arrested. TR. 121, 123. The officer's opportunity to observe that the defendant was carrying a black raincoat was, to say the least, limited. Their testimony is no doubt colored by the fact that the raincoat was sub-

sequently recovered (having been discarded during flight). In Gatlin, at least the suspect was wearing the trenchcoat. In this case, up to the time when the police approached the defendant, the identification of the clothing in his hand as a raincoat is highly suspect.

Defendant contends that the arrest took place when the police pulled ahead of him, into a driveway, and called to him to halt. TR. 15. In *Henry v. United States* (1959) 361 US 98, 103, the Supreme Court stated:

"When the officers interrupted the two men and restricted their liberty of movement, the arrest, for purposes of this case, was complete."

By pulling into a driveway ahead of the defendant, the police in this case blocked his movement and caused him to flee. He could not have continued along his original path without having been in contact with the police. This was an arrest of the defendant, and it was without probable cause.

The subsequent events add only one additional fact to justify arrest, assuming that the arrest were not to be held to take place when the defendant was stopped by Officer Thurman during flight TR. 7, or when he was apprehended at Seventh and M Streets by Officer Bowden TR. 8.

The only added fact to justify arrest at these later stages was flight. However, flight is of little significance in this case. We are concerned not with flight from the scene of the offense, but flight from police officers who were trying to apprehend the defendant. There is no evidence to indicate that the police informed the defendant of the charge for which they were trying to apprehend him. Therefore, the defendant's flight cannot be construed as an indication of guilt in connection with this particular offense. As suggested in *Miller v. United States* 320 F.2d 767 (D.C. Cir., 1963) flight can well be taken as "terrorized innocence" or perhaps guilt of "some" offense. At best, flight in the present case can be taken as a "consciousness of guilt", but not of consciousness of guilt of this specific offense. Probable cause must rest on a justified belief by the police that the suspect is the person who committed a specific offense. Flight by a person who is not informed that he is sought for that offense cannot be construed as an indication of guilt of that offense. Nor does the fact of flight add anything of substance to the information communicated by the police broadcast. There are simply too many people who might be in the downtown

Washington, D. C. area answering to the broadcast description and who might flee from the police approaching them in a menacing manner. The description broadcast was simply too vague and general and the defendant's flight could be taken as indicating too many different things for these facts, taken together, to justify arrest.

EXCLUSION OF EVIDENCE OBTAINED AS A RESULT OF UNLAWFUL ARREST

Four important pieces of evidence came into the possession of the police as a result of the unlawful arrest. First, the police recovered \$34.00 in bills from the defendant's right pants pocket when he was taken into custody. TR. 9, 131-132. This coincided with the complaining witnesses testimony about the denominations of the bills taken during the robbery. TR.92.* Second, the police caused the defendant, by pursuing him, to discard the black raincoat, Government's Exhibit 1. Third, the police obtained a creamy substance from the defendant's ear and a stain of material from the raincoat. TR. 155, 154. Fourth, the Government obtained an eye witness identification by the complaining witness of the defendant while the defendant was in custody at the police station awaiting taking him to the Court of General Sessions for a Preliminary Hearing. TR.96. Evidence obtained as the result of an unlawful arrest is incompetent and inadmissible. Evidence obtained as the result of an

* Cf Taglavore v. United States, 291 F.2d 262 (9th. Cir., 1961)

unlawful search is inadmissible. Weeks v. United States 232 US 383 (1914). Ordinarily, a search may not take place without a warrant. U.S. Constitution, Amendment 4. While a search may be justified without a warrant in the case of a lawful arrest, this exception does not apply when the arrest is unlawful. Henry v. United States 361 US 98, 102 (1959). Furthermore, all other forms of evidence obtained by the police as a result of the unlawful arrest are incompetent and inadmissible. Silverthorne Lumber Company v. United States 251 US 385 (1920). Each of the items of evidence mentioned above was obtained by the police as a result of the unlawful arrest.

THE SECOND LINE-UP

Following the Preliminary Hearing in this case, The Court of General Sessions ordered that the defendant be taken from the D. C. Jail to the headquarters of the police for the purpose of a line-up. This was done, and the defendant appeared in a line-up where he was observed by the complaining witness. TR. 97. The order recited the following:

"A line-up will be held in the office of the Robbery Squad, Third Floor, Municipal Police Department Headquarters, 300 Indiana Avenue, Washington, D. C. on February 11, 1969 at 6:30PM. The defendant will be ordered up from D. C. Jail if he remains in custody on that date. If he is released on bond, attendance at the line-up will become a condition of his release. The defence counsel, is invited to attend. The United States will have its witnesses in the above-entitled case present for the line-up, in addition to other complainants it may produce.

W. C. Pryor
Judge

The order cited as its authority Adams v. United States (Slip OP. 20547 dated June 21, 1968) (399 F.2d 574). At the Pre-Trial Hearing in this case, the United States Attorney relied on "The Coleman Case", presumably Coleman v. United States 419 F.2d 740 (D. C. Cir., 1969). However, neither the Adams case nor the Coleman case supports the

order of the General Sessions Court in this case. In Coleman, The Court of Appeals authorized a line-up in aid of the Preliminary Hearing. The Court of Appeals indicated that the Commissioner might order that a line-up be carried out before he makes his decision. This court held

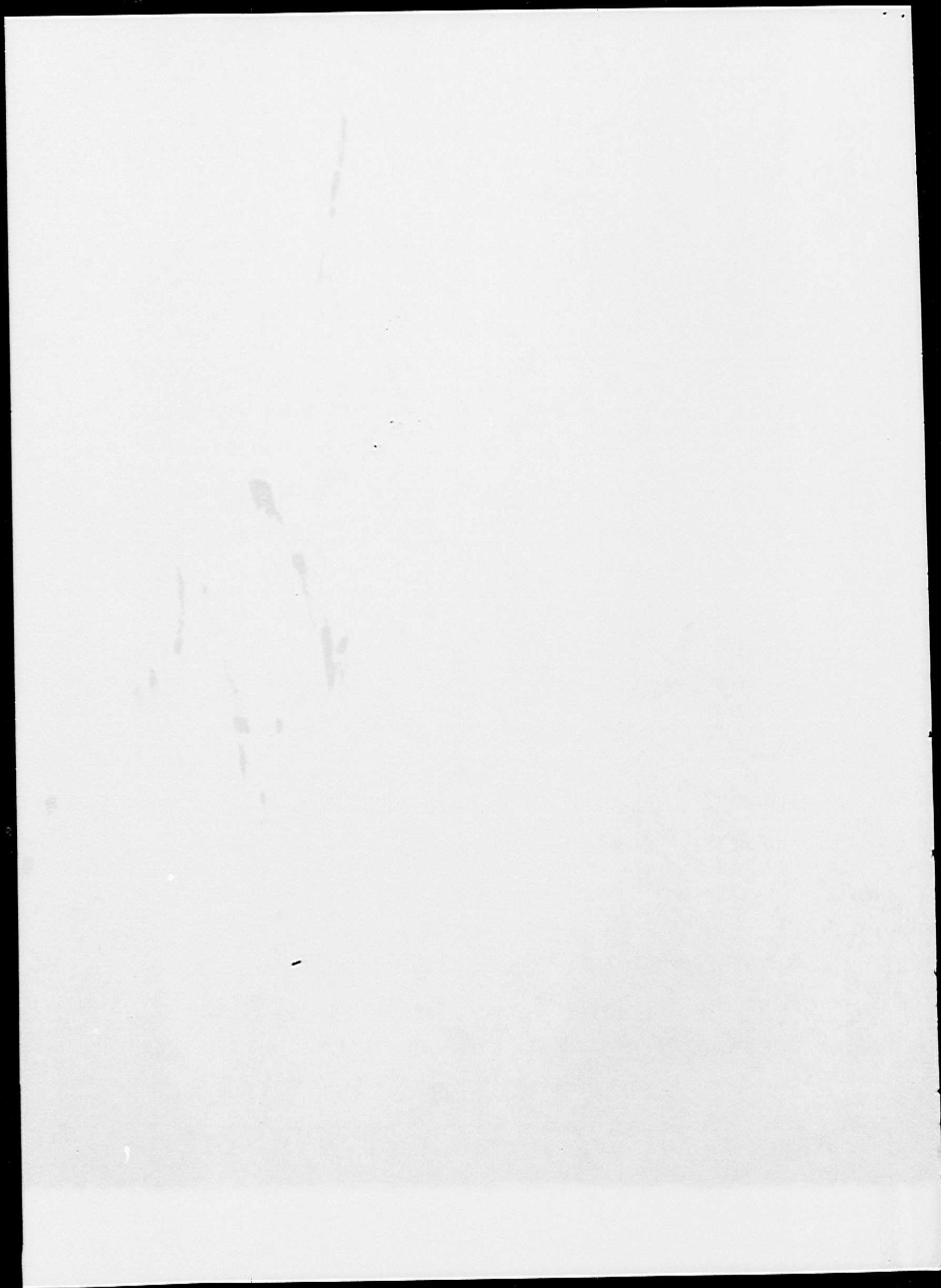
"In a case in which the arrest was made on probable cause but further investigation clouds the issue, the Commissioner's power to provide for line-up can be justified, without regard to other reasons that may be found, as part of a process of obtaining the fullest information possible before making his ruling on the issue of further detention."
(Emphasis added)

In this case, a Preliminary Hearing was held before Judge Howard of the Court of General Sessions, apparently on February 6, 1969. Judge Howard ordered the defendant committed and held for the action of the Grand Jury. The subsequent order by Judge Pryor for a line-up on February 11, 1969 cannot be justified by the decision in the Coleman case. Neither can it be justified by any other authority. Presumably Judge Howard was satisfied by the testimony at the Preliminary Hearing that the defendant had been identified, by competent evidence. The defendant had already been identified by the complaining witness at the police precinct to which

he was taken when he was arrested. The only purpose of the subsequent line-up would be to produce further evidence of identification, perhaps because of fear that the original identification was clouded. This, then, was a proceeding carried out not for the purposes of the Preliminary Hearing, but for the purpose of assembling evidence for use at trial. The defendant was taken from the custody of the Department of Corrections and placed in the custody of his adversary, The Government, where he was subjected to a line-up. In this sense, the line-up was analogous to the various forms of discovery authorized in civil cases under the Federal Rules of Civil Procedure. But no corresponding authority exists for discovery of this nature in criminal cases. Subjecting the defendant, contrary to his will, to this type of proceeding is a denial of due process, U.S. Constitution, Amendment 5, and renders all testimony derived from that line-up inadmissible. United States v. Wade 388 US 218 (1967).

• SUMMARY OF EXCLUDABLE EVIDENCE

Since the defendant was not apprehended at the scene of the alleged offense, he has been connected with the offense only on the basis of tangible evidence and eye witness testimony. The tangible evidence consists of a raincoat which had been identified by the complaining witness to the police, the sum of \$34.00 in one and five dollar bills taken from the defendant and a creamy substance taken from the defendant's ear and found to be present in the black raincoat by an FBI chemist. The eye witness testimony is based upon the observance of the defendant at the police station, shortly after he was apprehended, and a post Preliminary Hearing line-up. All of this evidence, other than the post Preliminary Hearing line-up, came into the possession of the police solely as the result of an unlawful arrest. Therefore, it is inadmissible. Evidence pertaining to the line-up is inadmissible because the line-up was held without the consent of the defendant and based upon an order of the Court of General Sessions for which that court had no jurisdiction. While the defendant also was identified at trial by the complaining witness, his testimony is inadmissible because there is no independent basis for identification other than the viewing of the



defendant at the police station and at the line-up.
In fact, there is reason to believe that the line-up
may have been held because of a need to fix the identi-
fication. United States v. Wade, supra.

CONCLUSION

The conviction should be reversed.

Respectfully submitted,

Lawrence A. Hymn
Attorney for the Defendant

CERTIFICATE OF SERVICE

It is certified that a copy of this brief was
served by first class mail on the United States Attorney
this 8th day of June 1970.

Lawrence A. Hymn

BRIEF FOR APPELLATE

United States Court of Appeals
for the District of Columbia Circuit

No. 2487

United States of America, Appellee

GEORGE L. SAMPERS, Appellant

Appeal from the United States District Court
for the District of Columbia

FILED 5-1-49

THOMAS A. ROBERTS

Chief State Attorney

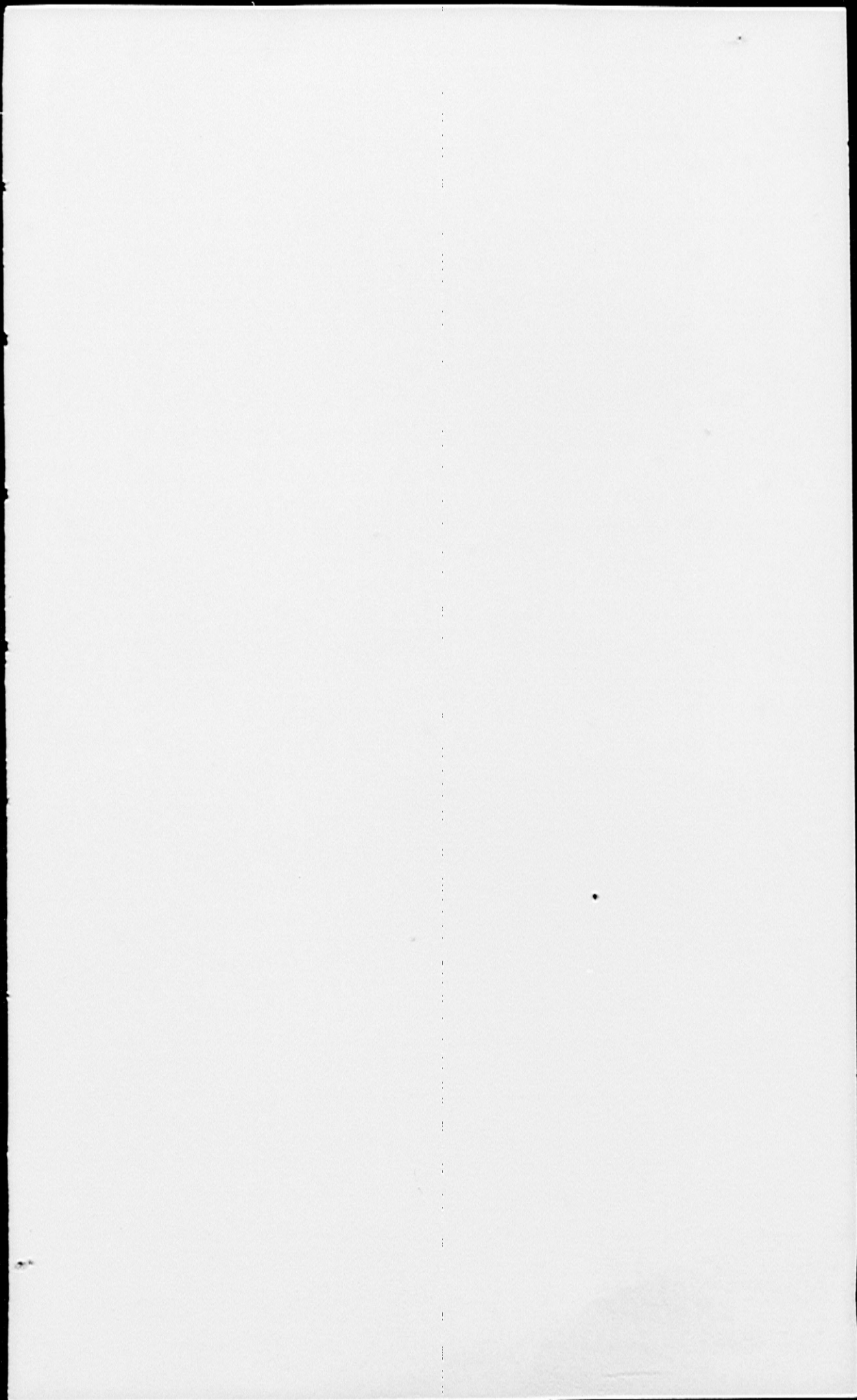
Walter J. Anderson

JOHN A. TERRY

WARREN L. MILLER

Assistant United States Attorneys

Cr. No. 812-49



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III

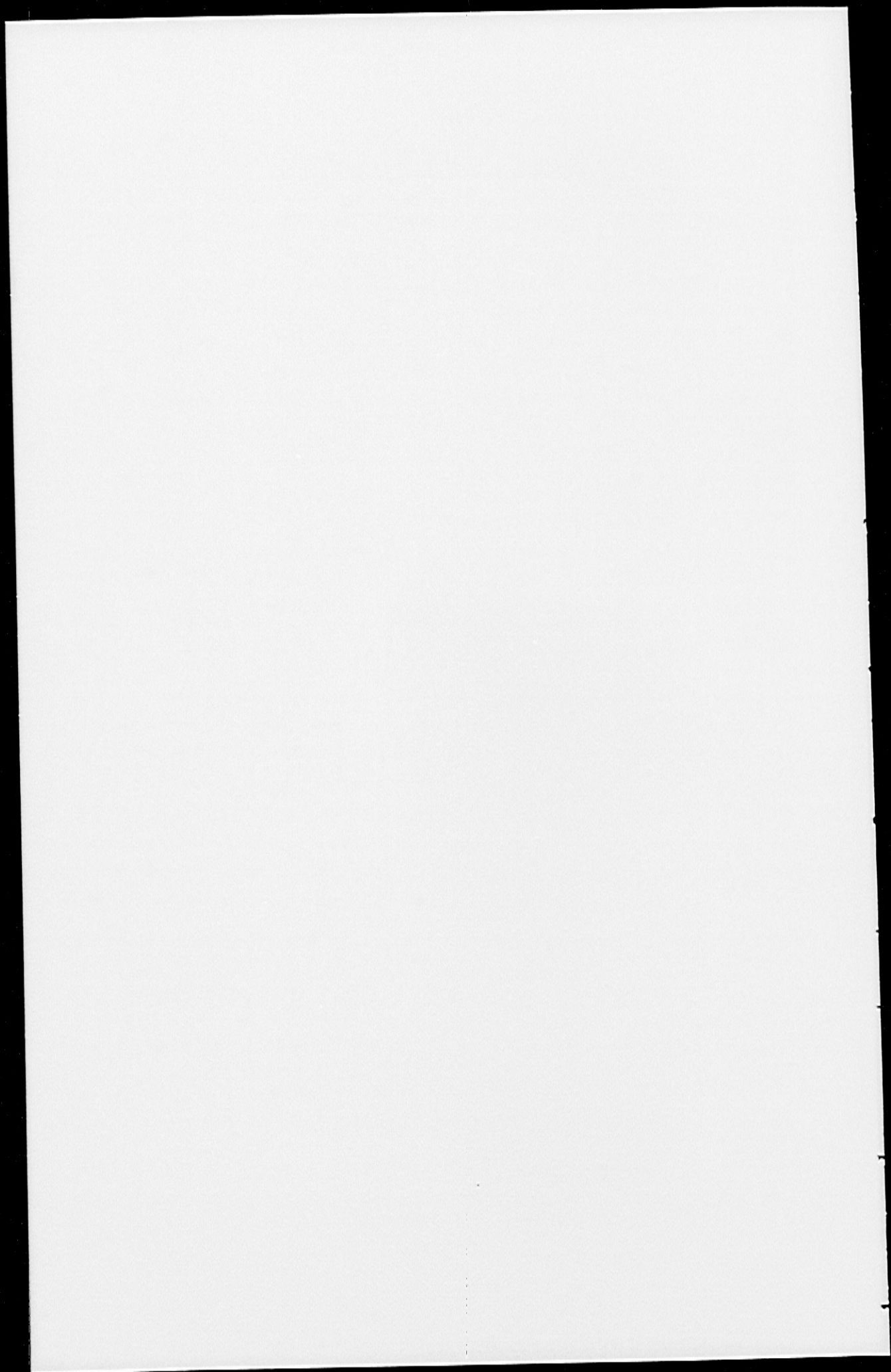
ISSUES PRESENTED *

In the opinion of appellee, the following issues are presented:

I. Whether probable cause existed for appellant's arrest?

II. Whether evidence of the lineup identification of appellant was inadmissible merely because the lineup order may have been authorized by a judge of the Court of General Sessions after the preliminary hearing was held?

* This case has not previously been before this Court.



United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 24,077

UNITED STATES OF AMERICA, APPELLEE

v.

GEORGE L. SAMUELS, APPELLANT

Appeal from the United States District Court
for the District of Columbia

BRIEF FOR APPELLEE

COUNTERSTATEMENT OF THE CASE

By indictment filed on March 11, 1969, appellant was charged with robbery (22 D.C. Code § 2901). Following the hearing and denial of pretrial motions to suppress evidence, a trial before Judge June L. Green and a jury was held on December 8 and 9, 1969. Appellant was found guilty as charged, and on February 17, 1970, he was sentenced to a term of three to ten years, the sentence to run concurrently with the sentence imposed in Criminal Case No. 1710-69. This appeal followed.

The Pre-Trial Hearing

Officer James K. Thurman of the Metropolitan Police testified that around 8:15 p.m. on February 3, 1969, he and his partner, Officer John D. Bowden, were cruising in a scout car in the 900 block of M Street, N.W., when they received a radio run regarding a robbery in the 1100 block of Fourteenth Street, N.W. The officers were advised to be on the lookout for a Negro male in his twenties, wearing a black raincoat and last seen walking east in the 1300 block of M Street. Moments later Officer Thurman observed a person fitting that description walking east in the 900 block of M Street. Thurman testified that this individual (later identified as appellant, Tr. 9, 46) was the only person on the street at the time, that he was constantly glancing over his shoulders, and that he was carrying what appeared to be a black raincoat in his hand (Tr. 4-6). The officers drove into a driveway in the 800 block of M Street, and Officer Bowden called to appellant, who was still walking east towards the scout car. Appellant then ran into an alley, pursued by the officers. While chasing him, Officer Thurman observed appellant throw away the raincoat. Thurman continued pursuing appellant and managed to stop him momentarily as he climbed over a fence. After relating to the officer that a man with a gun had told him to run, appellant took off running again.¹ Appellant was finally apprehended by Officer Bowden at the corner of Seventh and M Streets (Tr. 6-8). A search of appellant disclosed \$34 in bills, and a pellet gun was recovered from the black raincoat which he had thrown away (Tr. 8-9).

The court ruled that the officers had probable cause to arrest appellant and denied the motion to suppress the physical evidence. After hearing additional testimony relevant to the identification of appellant, the court denied the motion to suppress the identification (Tr. 30-85).

¹ Officer Thurman stated that appellant had thrown off the corduroy coat he had been wearing and was dressed only in a shirt, even though it was an extremely cold night (Tr. 7-8, 117).

The Trial

Mr. Robert H. Derrick testified that around 8:00 p.m. on February 3, 1969, he was working in the Mid-City Delicatessen at 1125 Fourteenth Street, N.W., when he was robbed by appellant. Mr. Derrick related that appellant was dressed in a black raincoat and approached the counter to pay for some cookies. When Derrick rang up the sale on the cash register, appellant put his hand in his coat pocket and told Derrick to give him everything he had. Appellant reached into the register and took a handful of \$1 and \$5 bills. Derrick then grabbed a bowl of mayonnaise that was on the counter and threw it at appellant. The bowl hit the register and splattered mayonnaise all over the door by which appellant was leaving (Tr. 88-94). Mr. Derrick identified appellant at the precinct forty-five minutes after the robbery and also at a lineup and in court (Tr. 95-97).

Mr. Don M. Rutley, the owner of the delicatessen, testified that he chased a man in a black raincoat east on M Street for a short distance and then returned to the store. He stated that between \$40 and \$50 was taken during the robbery, consisting mainly of one-dollar bills (Tr. 109-114).

Officers Thurman and Bowden then testified regarding the apprehension and arrest of appellant. They also stated that when arrested, appellant had twenty-four \$1 bills and two \$5 bills "wadded up and shoved" into his pocket. A pellet gun was also found on appellant, and a creamy white substance was taken from his right ear. A white substance was also found on the black raincoat which the officers saw appellant discard (Tr. 114-137). Mr. Eugene W. Reider, a chemist at the Federal Bureau of Investigation, was qualified as an expert and testified that the substances he received from Officer Bertram P. Breedlove for testing were found to be a vegetable oil (Tr. 142-153). Officer Breedlove testified that the substances he gave to Mr. Reider were a sample of the mayonnaise from the door of the delicatessen, the white substance found in

appellant's ear, and the black raincoat which had white stains (Tr. 153-157).

Appellant testified that he was inside the delicatessen on the night of the offense, but he was wearing only his corduroy coat.² He stated that one Mike McClough came into the store about the same time and that McClough was wearing a black raincoat. As he was leaving the store, appellant was pushed to the side and saw McClough reaching into the register. McClough fled from the store and drove away in a 1962 Ford. Appellant then walked down Fourteenth Street, and when Mr. Rutley yelled at him, appellant just "grinned at him" and kept on walking (Tr. 163-170). He stated when he saw the police he fled because he had a pending burglary charge against him and was afraid of getting involved (Tr. 172-174, 191).

In rebuttal the Government called Sergeant Louis Blacato of the Metropolitan Police, who testified regarding the procedures used at the lineup in which appellant was identified (Tr. 210-219). Officer Thurman testified that no mayonnaise was found on appellant's corduroy jacket (Tr. 219).

ARGUMENT

I. Probable cause existed for appellant's arrest.

(Tr. 4-9, 46, 117)

Appellant contends that the police lacked probable cause to arrest him, and consequently the evidence obtained as a result of that arrest should have been suppressed. Appellee disagrees.

In *Bailey v. United States*, 128 U.S. App. D.C. 354, 357-358, 389 F.2d 305, 308-309 (1967), this Court had occasion to summarize the applicable standards for determining the existence of probable cause:

Probable cause is a plastic concept whose existence depends on the facts and circumstances of the par-

² Appellant admitted that when Derrick threw the bowl, some of the mayonnaise got on him (Tr. 169).

ticular case. It has been said that "[t]he substance of all the definitions' of probable cause 'is a reasonable ground for belief of guilt.'" *Brinegar v. United States*, 338 U.S. 160, 175 (1949). Much less evidence than is required to establish guilt is necessary. *Draper v. United States*, 358 U.S. 307, 311-312 (1959). The standard is that of a "reasonable, cautious and prudent peace officer" and must be judged in the light of his experience and training. *Bell v. United States*, 102 U.S. App. D.C. 383, 387, 254 F.2d 82, 86, cert. denied, 358 U.S. 885 (1958). The police must have enough information to "warrant a man of reasonable caution in the belief" that a crime has been committed and that the person arrested has committed it. *Carroll v. United States*, 267 U.S. 132, 162 (1925). See also *Henry v. United States*, [361 U.S. 98, 102 (1959)]. A finding of probable cause depends on the "practical considerations of everyday life on which reasonable and prudent men, not legal technicians, act." *Brinegar v. United States*, supra, 338 U.S. at 175.

When this "plastic concept" is applied to the facts of the instant case, the conclusion is inescapable that the police officer acted reasonably in arresting appellant. As in many cases, no one particular fact or circumstance can be relied upon to furnish probable cause, but when the circumstances are viewed in their totality, the arrest was clearly a proper one. Briefly marshaling the information which confronted the officers at the time of the arrest, we note the following facts.

Officers Thurman and Bowden were advised by the police dispatcher to be on the lookout for a Negro male in his twenties, wearing a black raincoat and walking east in the 1300 block of M Street. Moments later they observed appellant walking east in the 900 block of M Street. Appellant fit the description, was carrying what appeared to be a black raincoat in his hand, and was the only person on the street. When he saw the officers, appellant fled (Tr. 4-9, 46), and while running away from the officers, he threw away his raincoat. When finally

apprehended, appellant was dressed only in a shirt and was carrying his corduroy coat in spite of the fact that it was an extremely cold night (Tr. 7-8, 117).

Clearly the officers were justified in investigating what appeared to be suspicious circumstances. *Allen v. United States*, 129 U.S. App. D.C. 61, 390 F.2d 476, *motion to modify opinion denied*, 131 U.S. App. D.C. 358, 404 F.2d 1335 (1968). Moreover, the flight of appellant when approached by the police demonstrated what the officers were justified in thinking was conduct evidencing a consciousness of guilt. *Allen v. United States*, 164 U.S. 492, 498-499 (1896); *Hunt v. United States*, 115 U.S. App. D.C. 1, 3-4, 316 F.2d 652, 654, 655 (1963); *Edmonds v. United States*, 106 U.S. App. D.C. 373, 379-380, 273 F.2d 108, 114-115 (1959), *cert. denied*, 362 U.S. 977 (1960). Taking the totality of the circumstances that confronted the officers, one would be hard pressed to suggest that probable cause was absent. Accordingly, we submit that the motion to suppress was properly denied.

II. Evidence of the lineup identification of appellant was not inadmissible at trial merely because the lineup was ordered by a judge of the Court of General Sessions after its jurisdiction may have terminated.

Appellant contends that the evidence of his lineup identification was inadmissible because the lineup was ordered by a judge of the Court of General Sessions after the preliminary hearing was held and, consequently, after that court's jurisdiction had terminated. Appellant claims that this amounted to a denial of due process of law and asks that his conviction be reversed.

Initially, we take issue with appellant's assertion that the lineup order was issued after the preliminary hearing had been held. The record is completely silent in this regard. It contains only an *undated* lineup order signed by Judge Pryor of the Court of General Sessions. Whether the lineup was ordered before or after the preliminary hearing was held cannot be determined from the court documents.

Assuming *arguendo* that the order in question was signed after the preliminary hearing, we fail to see how appellant was denied due process of law or how he has been prejudiced. Although judges of the Court of General Sessions serve only as committing magistrates in felony cases, 11 D.C. Code § 963 (c), and are without jurisdiction of the case subsequent to the hearing,³ the issuance of such an order would have been merely a ministerial function and could not have prejudiced appellant. Moreover, lineups will often afford an opportunity for those unjustly accused of a crime to be exonerated. We submit that even if the lineup was erroneously ordered, such error was harmless.⁴ Finally, we must recognize that while the record is silent as to whether Judge Pryor ordered the lineup before or after the preliminary hearing, his actions are presumed to be proper.⁵ It must, therefore, be presumed that he ordered the lineup before the preliminary hearing in the absence of any affirmative indication in the record to the contrary.

³ Except for certain statutory exceptions. See 18 U.S.C. § 3147, as applied in *Shackleford v. United States*, 127 U.S. App. D.C. 285, 383 F.2d 212 (1967), and *Grimes v. United States*, 129 U.S. App. D.C. 308, 394 F.2d 933 (1967).

⁴ Even without the lineup, there were photographic and in-court identifications of appellant. *Long v. United States*, — U.S. App. D.C. —, 424 F.2d 799 (1969); *Solomon v. United States*, 133 U.S. App. D.C. 103, 408 F.2d 1306 (1969); see *Harrington v. California*, 395 U.S. 250 (1969).

⁵ The Supreme Court has unequivocally stated:

The presumption of regularity supports the official acts of public officers, and in the absence of clear evidence to the contrary, courts presume that they have properly discharged their official duties. [Citations omitted.]

United States v. Chemical Foundation, 272 U.S. 1, 14, 15 (1929). See also *Dunn v. Ickes*, 72 App. D.C. 325, 326 n.8, 115 F.2d 36, 37 n.8, cert. denied, 311 U.S. 698 (1929), *Pasadena Research Laboratories v. United States*, 169 F.2d 375, 382 (9th Cir.), cert. denied, 335 U.S. 853 (1948).

CONCLUSION

Wherefore, appellee respectfully submits that the judgment of the District Court should be affirmed.

THOMAS A. FLANNERY,
United States Attorney.

JOHN A. TERRY,
WARREN L. MILLER,
Assistant United States Attorneys.

UNITED STATES COURT OF APPEALS
For the District of Columbia Circuit

United States of America,

Appellee,

v.

No. 24,077

George L. Samuels,

Appellant.

* * * * *

REPLY BRIEF FOR APPELLANT

United States Court of Appeals
for the District of Columbia Circuit

FILED NOV 27 1970

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I. THERE WAS NO PROBABLE CAUSE
FOR APPELLANT'S ARREST.

The Government has cited numerous authorities to the effect that probable cause is a flexible concept which depends upon the facts and circumstances of each case, but it has cited no authority that the facts which exist in this case constitute probable cause. In fact, the only circumstances in this case which the Government has correlated with its cited authorities are flight and the investigation of what appeared to be suspicious circumstances.

Probable cause rests upon knowledge by the arresting officer that an offense has been committed and reasonable grounds for believing that the person arrested committed the offense. There is no dispute in this case that the arresting officers had been informed that an offense had taken place. However, the dispute arises over whether they had probable cause to believe that the defendant was the person who had committed the offense.

The Government's brief sidesteps the question of when the arrest took place but curiously cites Bailey v. United States, 128 U.S. App. D.C. 354, 389 F.2d 305 (1967) without reference to this Court's comments on that subject:

"Though the arresting officers here did not think that a formal arrest took place until after the stolen wallet was spotted, seized and examined, the Government, as in *Henry v. United States*, 361 U.S. 98, 103 (1959), concedes that in law the arrest of the car's passengers as well as its driver took place at the time Officer Stone approached the car, perhaps with gun drawn, and told appellants to sit still and keep their hands in plain sight."

In this case it is the contention of the appellant that the arrest took place when the officers pulled into a driveway across the sidewalk upon which he was walking and told him to stop, and the question of probable cause rests upon the information which the police officers had at that time.

There is no dispute that the police officers had received a "lookout" which had been broadcast on the radio in their cruiser. At the trial of this case the Government produced a transcript of that broadcast (Tr. 12) which the Court read (Tr. 23) and the pertinent portion of which counsel read into the record (Tr. 23):

"MR. HYMO: There is a very brief and vague description referring to a Negro male wearing a black raincoat, last seen running on M (Mary) towards Thirteenth, and that was repeated on down: One Negro male wearing a black raincoat running on M (Mary) towards Thirteenth Street."

Before this transcript was produced, Officer Thurman testified

that the lookout also identified the suspect as "in his twenties" (Tr. 5), but he subsequently admitted that he had not seen the transcript prior to his testimony (Tr. 13) and he accepted it as "approximately what you recall having heard" (Tr. 13). Officer Bowden testified as to his personal recollection in regard to the transcript (Tr. 129) but made no mention of the age of the defendant appearing in the lookout.

Thus, the only information on the lookout was that the suspect was:

- (a) A Negro
- (b) male
- (c) wearing a black raincoat
- (d) last seen running on M (Mary) towards Thirteenth Street.

At the time when the officers first saw the appellant they were approaching him from behind and he was not wearing a black raincoat (Tr. 129). They saw an article of clothing in the defendant's hand (Tr. 19).

The lookout was for a Negro male. He could have been ten years old, fifty years old or seventy years old. He could have been seven feet tall or five feet tall. He could have weighed one hundred pounds, two hundred pounds or three hundred fifty pounds. He could have been dark-skinned

or light-skinned. He could have had long hair or short hair. He could have had a moustache or no moustache. He could have had a beard or no beard. He could have been wearing a necktie or not. It is quite apparent that the sketchy description which had been broadcast could have identified a large number of people and was not sufficient to single out the defendant.

The only other information in the lookout was that the defendant was seen "running" east in the 1300 block of M Street Northwest. However, he was first sighted four or five blocks away and he was not running.

The Government has made much of the right of officers to investigate what appear to be suspicious circumstances, citing Allen v. United States, 129 U.S. App. D.C. 61, 390 F.2d 476, but in that case the suspicious circumstances consisted of driving a car at night, slowly, with its lights out. After an arrest had been made for a traffic violation, it was discovered that the driver had no permit. The victim of the offense was in the back seat of the car, badly injured, and when asked who had hurt him, pointed to the defendant. The relationship to the present case is hardly clear.

The Government also makes much of the question of flight. In Hunt v. United States, 115 U.S. App. D.C. 1,

316 F.2d 652, the flight consisted of running from the scene of the crime when approached by arresting officers in the company of the victim of a purse robbery. In the present case, the defendant was not seen by the arresting officers running or walking from the scene of the crime but was seen several blocks away, walking. Flight did not begin until after the officers pulled in front of the defendant and tried to apprehend him. As recognized by this Court in Hunt, there are:

"so many reasons for [flight] consistent with innocence that it scarcely comes up to the standard of evidence tending to establish guilt."

In Edmonds v. United States, 106 U.S. App. D.C. 373, 273 F.2d 108 (1959), cert. denied, 362 U.S. 977 (1960), also cited by the Government, the flight apparently consisted of taking the decedent's car and driving to Georgia after having admittedly strangled the decedent. These are quite different circumstances from the present case.

In short, it is submitted that there was not sufficient evidence for a reasonable person to believe that a Negro male walking along the street several blocks distant from the scene of an offense, with nothing more, was the person who had committed the offense.

II. THE COURT OF GENERAL SESSIONS
LACKED JURISDICTION TO ORDER
A LINEUP.

The Government has relied upon two points to support the lineup:

(a) The Court of General Sessions was performing "merely a ministerial function."

(b) The lineup order is undated and must be presumed to have been signed before the preliminary hearing.

Both of these contentions sidestep the main issue, i.e. that the Court of General Sessions had no jurisdiction to order this lineup. It makes no difference whether a "ministerial" label is applied to the order. The Government still has failed to cite any authority which authorized the Court to grant that order or, assuming that the function were ministerial, which directed it to do so. Defendant also does not know of any such authority.

It also makes little difference when the order was signed; its effect was a lineup after the preliminary hearing. As the Government's brief points out, the judges of the Court of General Sessions serve only as committing magistrates in felony cases, 11 D.C. Code § 963(c). The record shows that the defendant was arrested on the evening of February 3, 1969

and was held overnight, before being taken before the Court of General Sessions on February 4. For reasons which do not appear, the Preliminary Hearing was continued to February 6, 1969 and the Preliminary Hearing was held on February 6, 1969, at which time the defendant was ordered held for the action of the Grand Jury. At this point in time, the Court of General Sessions had nothing more to do in the case.

It has been presumed previously that Judge Pryor's order was entered after the Preliminary Hearing. Assuming, however, that it was signed between the defendant's first appearance at the Court of General Sessions--on February 4--and the Preliminary Hearing--on February 6--it is still not clear wherein the Government considers there was jurisdiction to order a lineup on February 11. There may be a need for a lineup to aid the Court of General Sessions to conduct a Preliminary Hearing. But the lineup in this case obviously had no relationship to the Preliminary Hearing which was to be held five days before the scheduled lineup. In essence, the lineup was an extra bit of pretrial discovery for the Government, providing a further opportunity to fix the identification testimony. But there was no legal authority for the Court of General Sessions to compel the defendant's attendance.

Furthermore, it seems unlikely that Judge Pryor would have granted an order, before the Preliminary Hearing, which would authorize a lineup after the Preliminary Hearing. It is just as likely that the Preliminary Hearing would result in defendant's release as in his being detained. Surely, if he were released, the Court could not and would not have ordered him to attend a lineup subsequently.

CONCLUSION

The conviction should be reversed.

Respectfully submitted,

Lawrence A. Hyma
Attorney for the Defendant

CERTIFICATE OF SERVICE

It is certified that a copy of this reply brief was served by first-class mail on the United States Attorney this 19th day of November, 1970.

Lawrence A. Hyma